MOTION FILED
MAR 12 1986

No. 85-1349

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

INTAKE WATER COMPANY,
Petitioner,

v.

YELLOWSTONE RIVER COMPACT COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR THE YELLOWSTONE RIVER PIPELINE CO., INC. AND THE WYOMING HERITAGE SOCIETY AS *AMICI CURIAE*

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QUESTION PRESENTED

A part of Article X of the Yellowstone River Compact provides, "[n]o water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Based on that language, do any of the three signatory states—Montana, North Dakota or Wyoming—have a legal right to block an interstate transfer of water?

PARTIES TO THE PROCEEDINGS

Wyoming Heritage Society and the Yellowstone River Pipeline Co., Inc., *amici curiae*, adopt the statement of petitioner Intake Water Company as to "Parties to the Proceedings"; "Opinions Below"; "Jurisdiction;" "Pertinent Constitutional Provisions and Statutes"; and "Statement of the Case."

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Yellowstone River Pipeline Company, a Wyoming Corporation, and the Wyoming Heritage Society hereby respectfully move the Court for leave to file the attached brief as *amici curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorneys for the respondents has not been obtained.

The interest of Yellowstone River Pipeline, Inc., in this case arises from a case pending in the Federal District Court for the District of Montana, Billings Division, entitled *Yellowstone River Pipeline Co. v. Montana Dep't of Natural Resources and Conservation*, No. CV-83-86-BLG (D. Mont.), where the issue of the interpretation of Article X of the Yellowstone River Compact is before the district court. Indeed, that court has stayed that case pending the outcome of this case.

The interest of the Wyoming Heritage Society lies in the serious negative impact that affirmance would have upon the prospects for future development of Wyoming's entitlement to its Yellowstone River Compact water allocation. More particularly, the Wyoming Heritage Society is concerned about the serious effect that affirmance would have upon development of Wyoming's huge coal resources, a true national asset that may otherwise go to waste.

In the instant case, petitioner argued before the Ninth Circuit that Article X of the Yellowstone River Compact was subject to challenge as an undue burden on interstate commerce. Since it is likely that petitioner may pursue the same argument in this Court, it is believed that the brief which the *amici curiae* would file would provide a more complete argument on this vital constitutional issue and would also present the view of other interested parties from a different jurisdiction. The undersigned *amici curiae* request that they be allowed to file the attached brief. When and if a writ of certiorari issues, they intend to file a brief in the principal case.

Respectfully submitted,

WYOMING HERITAGE SOCIETY AND
YELLOWSTONE RIVER PIPELINE
COMPANY, INC., *Amici Curiae*

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BRIEF FOR THE YELLOWSTONE RIVER PIPELINE CO., INC. AND THE WYOMING HERITAGE SOCIETY AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

The Yellowstone River Pipeline Co., Inc. ("YRP") has a direct, tangible interest in the outcome of this case. The decision here will determine YRP's right to pursue a planned water project currently the subject of a suit in the federal district court for Montana. That suit raises the same basic issues challenged here and has been stayed pending the outcome of this proceeding.[1]

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[1] *See* discussion below.

The Wyoming Heritage Society ("WHS") is an association that seeks the protection of Wyoming's values and its resources. Although these views are local and "homegrown", WHS believes that a failure to protect the right to use and develop the 2.2 million acre feet of water that flow out of Wyoming to the Gulf of Mexico will one day have disastrous effects on this state's ability to use and develop its coal resources. The efficient utilization of Wyoming's low-sulphur, relatively low-energy (9500 BTU per pound) coal requires water. Most of the coal is located outside the drainage basin of the Yellowstone River, and economics dictate that the water be moved to the coal. For these reasons WHS is concerned that the conclusion reached by the courts below will hamper resource development in Wyoming. Therefore, WHS believes a closer look at this case, and a reversal of the judgment below, will serve both Wyoming and the nation.

REASONS FOR GRANTING THE WRIT

This Court's ruling on the Commerce Clause challenge raised by petitioner Intake Water Company will also dispose of a similar challenge raised by *amicus curiae* YRP in a case currently pending before the United States District Court for the District of Montana. *Yellowstone River Pipeline Co.* v. *Montana Dep't of Natural Resources and Conservation*, No. CV-83-86-BLG (D. Mont.).[2] YRP faces the identical harm there that gave rise to suit in the instant case: unless this Court reverses the decision of the Court of Appeals, the state legislatures of Montana, North Dakota, and Wyoming can each permanently block the export of water across state lines relying only on Article X of the Yellowstone River Compact (the "Compact"), 65 Stat. 663, art. X.

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[2] On March 16, 1984, Judge Batten stayed proceedings in that case pending the outcome of this case. App. 1a.

In *Yellowstone River Pipeline*, the plaintiff seeks to build a 108 inch diameter pipeline capable of exporting approximately 25,000 acre feet annually of Yellowstone River water from Montana to Wyoming. Much, if not all, of this water would be used to develop one of the nation's major energy resources: an estimated 20 billion tons of low sulphur coal found principally in the Fort Union Formation in Northeastern Wyoming.

In this case, neither the district court nor the court of appeals gave even cursory consideration to the implications of a legal rule that Article X of the Compact permits states to deny water for use in such future energy developments. A more thorough analysis of the reasons underlying the Compact negotiations and its subsequent approval by Congress will not support the kinds of restrictions on interstate water transfer that Wyoming, Montana, and North Dakota currently maintain.

It is simply undeniable that in numerous well-reasoned cases this Court has refused to allow individual states to lock up their resources. More specifically, this Court has told the western states that they may not lock up water. *Texas* v. *New Mexico*, 462 U.S. 554 (1983); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd*, 385 U.S. 35 (1966). Moreover, it is clear that this Court has repeatedly told all states that the Commerce Clause is intended to prohibit the economic balkanization of the country that would result if states hoarded their natural resources. *E.g.*, *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

Petitioner Intake Water Company proposes a plan similar to that of *amicus curiae* YRP. Both projects would move Mohammed to the mountain: water from the river would be shipped to the coal fields. Both plans are reasonable from the point of view of the Compact because there exist substantial amounts of unused water

flowing down the Yellowstone River to the Missouri River, the Mississippi River and ultimately the Gulf of Mexico. Wyoming's unused share alone is about 2.2 million acre feet per year. Speech by George Christopolus, Wyoming State Engineer, to Wyoming Water Development Association, Casper, Wyoming, November 16, 1981.

In 1973, when the OPEC nations placed an embargo on shipments of crude oil to this country, the major energy companies came to Wyoming in droves. Their objective was to produce liquified hydrocarbons from the 20 billion tons of low sulphur coal located there. But coal production requires water, and thus the first major hurdle for new coal projects became access to adequate supplies of water. For this reason, the impact of Article X on access to Yellowstone River water has special importance.

Currently, Wyoming's coal deposits are not being vigorously developed, but four circumstances could trigger an urgent national need for greatly increased production from the Wyoming coal fields. First, for economic or political reasons OPEC could organize an oil embargo. The plummeting price of crude oil could drive the OPEC cartel back together, and OPEC could launch efforts to embargo crude oil shipments. In that case, the major energy companies would turn to alternate energy sources, one of the most abundant of which is Wyoming's vast coal deposits. The coal could be gasified, liquified, and used to generate electricity.

Second, the growing acid rain problem could precipitate greater reliance on cleaner sources of energy. In that event, Wyoming's low-sulphur coal could be substituted for the high-sulphur coal that the eastern states currently use to generate electricity.

Third, the nation must be prepared to cope with the eventual and inevitable exhaustion of the world's crude

oil supplies. When that happens, it will be essential to use Wyoming's coal deposits.

The fourth and, of course, final possibility would be the outbreak of a major war or other event that cuts off national access to crude oil shipments and threatens national security.

Without access to water for use in the energy conversion process, utilization of Wyoming's coal deposits will be seriously impaired in any of the circumstances described above.

The district court and the court of appeals erred when they failed to investigate whether Congress truly intended the Compact to permit the parochial interests of Montana, North Dakota, and Wyoming to supersede all federal interests. The resources at stake are important to the nation, and their availability to other states is an issue of prime importance to our federal system.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and should reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

WYOMING HERITAGE SOCIETY AND
YELLOWSTONE RIVER PIPELINE
COMPANY, INC., *Amici Curiae*

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CV-83-86-BLG

YELLOWSTONE RIVER PIPELINE COMPANY,
A WYOMING CORPORATION,
Plaintiff,

—VS—

MONTANA DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION; *et al.*,
Defendants.

[Filed Mar. 25, 1984]

OPINION AND ORDER

On March 16, 1984, a telephonic hearing was held on plaintiff Yellowstone River Pipeline Co.'s motion to lift the stay imposed by this Court and to set a date for hearing defendants' motion to dismiss. Proceedings in this Court were stayed in December 7, 1983, upon plaintiff's request, pending the final resolution of *Intake Water Company v. Yellowstone River Compact Commission*, Civil No. 1184.

The Court finds no compelling reason to lift the stay at this time. The decisions ultimately reached in *Intake Water Co.* are likely to be dispositive of the key issues in this matter. Those issues common to both cases have been exhaustively briefed by counsel before a three-judge panel

in the *Intake Water Co.* case. Relitigating those same issues at this time will not hasten the final resolution of plaintiff's case and will result only in a needless expenditure of the Court's resources. Therefore,

IT IS ORDERED that plaintiff's motion to lift the stay imposed by this Court on December 7, 1983, and to set a date for hearing defendants' motion to dismiss is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 16th day of March, 1984.

/s/ James F. Batten
Chief Judge